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Nos. 77, 78

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1946

UNITED STATES OF AMERICA, *Petitioner*

v.

WILLIAM M. DICKINSON.

UNITED STATES OF AMERICA, *Petitioner*

v.

F. H. WITHROW.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF WILLIAM M. DICKINSON AND F. H. WITHROW

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THE CHARLESTON PRINTING COMPANY, CHARLESTON, WEST VIRGINIA

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OPINION BELOW

The district court did not write an opinion, other than the letter of December 14, 1944, (R. 35) and its findings

of fact and conclusions of law (R. 37). The opinion of the circuit court of appeals (R. 234-252) is reported at 152 F. (2d) 865.

JURISDICTION.

The judgments below were entered on January 4, 1946 (R. 252, 255). The petition for writs of certiorari was filed on April 3, 1946, and was granted on May 13, 1946 (R. 257). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 23, 1925. [28 U.S.C.A. 41 (20)].

QUESTIONS PRESENTED

We do not believe the Government has accurately stated the questions presented by these cases. In our view the questions presented are these:

1. Where, in connection with the construction and operation of a navigation dam, the United States completely submerges certain lands and, after the pool is filled, subjects other lands of the same tract to intermittent flooding, does the landowners' right of action accrue (a) when the dam is first placed in operation, although incomplete as to construction and operation and its partial operation is without any effect on the lands in question, or (b) when the dam is substantially complete but its operation, being less than full operation, neither floods all of the lands to be completely submerged, nor creates the condition which subjects the other lands to intermittent flooding, or (c) does the cause of action accrue, as the court below held, when the pool is completely filled, and all lands to be completely submerged are flooded and the condition created which subjects the other lands to intermittent flooding?

2. Where the United States takes a part of a single tract of land for the improvement of navigation, and the direct and proximate result of the taking of the part is to damage the residue of the tract, which damage can be prevented by timely protective measures at a cost of less than the amount of the damages that will ensue if permitted to go unchecked, does the Fifth Amendment impose an obligation on the United States to pay for the cost of such protective measures?

3. Where lands have been completely submerged and taken by the United States in connection with a navigation project, and a right of action has accrued to the owner under the Fifth Amendment for the full value of the lands taken, does the landowner lose any part of his cause of action or right to compensation, if, before suit or payment, he, at his own expense and with the consent of the Government, reclaims a part of the land by filling?

4. Whether there is sufficient evidence to support the lower courts' awards for a partial taking by intermittent flooding of respondents' lands lying between elevations 566 feet and 574 feet.

STATEMENT

The Government's "Statement" of facts is in the main correct and would appear to be sufficient, except that some few errors and omissions need to be pointed out.

The Government asserts that "on August 20, 1937, the dam had been officially accepted by the United States." (Br. 6) If counsel mean to imply that the dam had been completed prior to that time, the Government is in error. By its formal answers to the complaints filed in these cases, the Government declared that the dam was completed and put into permanent operation on or about August

1937 (R. 4). The lower courts found, based on all the evidence, that the dam was completed, inspected and accepted as complete on August 20, 1937 (R. 38).

The Government mistakenly asserts that some of the 8,000 cubic yards of rock fill and 8,000 cubic yards of earth fill installed by Dickinson at a cost of $16,000.00 was for beautification of the property (Br. 8). None of this fill was for beautification. All of it was to prevent further erosion and damage to his property (R. 61, 78, 39).

The Government contends that the evidence is not sufficient to support the findings of the lower court with respect to the intermittent flooding of respondents' lands lying beween elevations 566 and 574, or the market value of such flowage easements. In support of the contention counsel at this point undertake to summarize the evidence and pertinent parts of the record. We do not consider their summary a fair statement of the evidence from the standpoint of the respondents. However, we believe the question can be discussed more fully and to better advantage under Point IV of our Argument (*infra* pp. 31-36).

SUMMARY OF ARGUMENT

I. The Lower Court Correctly Held That the Causes of Action Accrued on September 22, 1938.

A. The construction and operation of the dam gave rise to only a single cause of action in each case.

From the outset there has been no dispute between the parties on this point, and both lower courts so held.

B. The taking was not complete until September 22, 1938. On that date all of the lands to be permanently

submerged were for the first time flooded, and the condition created which subjects the lands between elevations 566 and 574 to intermittent flooding.

Marion County, West Virginia v. *United States*, 53 Ct. Cls. 120;
Columbia Haley Dooner, et al. v. *United States*, 95 Ct. Cls. 392;
United States v. *Clarke*, 69 F. (2d) 748;
Joplin v. *United States*, 89 Ct. Cls. 345.

II. The Lower Court Correctly Held That Each Respondent Is Entitled to Recover the Damages to the Residue of His Tract of Land, Above That Permanently or Intermittently Flooded, Caused by and Which Are the Proximate Result of the Taking of the Part Appropriated; That Such Damages Include Erosion Due to Saturation and Softening of the Soil and Wave Action Thereon; and That Where Such Damages Can Be Prevented by Timely Protective Measures at a Cost of Less Than the Amount of the Damages Which Will Ensue if Permitted to Go Unchecked, the Measure of Compensation Is the Cost of Such Protective Work.

United States v. *Grizzard*, 219 U. S. 180;
United States v. *Welch*, 217 U. S. 333;
Campbell v. *United States*, 266 U. S. 368;
United States v. *General Motors Corporation*, 323 U. S. 373;
United States v. *Chicago, B. & Q. R. Co.*, 8th Cir. 82 F (2d) 131, certiorari denied 298 U. S. 689;
United States v. *Chicago, B. & Q. R. Co.*, 7th Cir. 90 F. (2d) 161, certiorari denied 302 U. S. 713;
United States v. *Cress*, 243 U. S. 316;
Wood v. *Wyoming County Court*, 100 W. Va. 29, 129 S. E. 747.

III. The Lower Court Correctly Awarded Compensation to Dickinson for His Lands Permanently Submerged But Later Reclaimed at His Own Expense.

Where fast lands have been completely submerged and taken by the United States for public use, and a right of action has accrued to the owner, under the Fifth Amendment, for the value of the lands taken, the landowner does not lose any part of his cause of action or right to compensation if, before suit or payment, he, at his own expense and with the consent of the Government, reclaims a part of the land by filling.

IV. There Is Ample Evidence to Support the Lower Courts' Awards for a Partial Taking by Intermittent Flooding of Respondents' Lands Lying between Elevations 566 and 574.

The evidence relates to issues of fact and upon re-examination will be found to be sufficient, but such re-examination is not called for. This Court will accept findings of fact concurred in by both lower courts, as establishing the facts found.

> *United States* v. *O'Donnell, et al.*, 303 U. S. 501; *Marion H. Allen, Collector*, v. *Trust Company of Georgia*, (decided January 28, 1946) 90 L. Ed. 305.

ARGUMENT

I. The Lower Court Correctly Held That the Causes of Action Accrued on September 22, 1938.

A. The construction and operation of the dam gave rise to only a single cause of action in each case.

From the outset the respondents have maintained that although the flooding of their lands was accomplished by separate and distinct rises in the level of the Winfield Pool, there was but one taking and, hence, only a single cause of action accrued in each case. The Government

has been of the same opinion and both lower courts so held (R. 42, 246). There being no dispute between the parties on this point, we see no occasion for further comment.

B. The taking was not complete until September 22, 1938. On that date all of the lands to be permanently submerged were for the first time flooded, and the condition created which subjects the lands between elevations 566 and 574 to intermittent flooding.

The Government first contends that the causes of action accrued on October 21, 1936 (Br. 31). Later, and as an alternative, the contention is made that the causes of action accrued on May 30, 1937 (Br. 37). On October 21, 1936, the Winfield Dam was far from complete. The roller gates had not been installed. It was possible, with the aid of cofferdams which are temporary devices, to regulate to some extent the pool level downstream from respondents' property, but the navigation pool on which respondents' properties abut was then controlled entirely by Old Lock and Dam No. 7 (R. 20, 170). In short, at that time the Winfield Dam was incomplete, and its partial or limited use had not and could not affect the level of the navigation pool at respondents' properties. We are not aware of any decision, either state or federal, holding that there is a taking under such circumstances. The Government has cited none. As pointed out by the lower court, it is well established that the mere fact that the Government has undertaken a flood control project and completed a part thereof without invasion of the land of abutting owners does not amount to a taking thereof. *United States* v. *Sponenbarger*, 308 U. S. 256, 265; *Danforth* v. *United States*, 308 U. S. 271, 286. An intention ultimately to use the

land is not sufficient to constitute a taking under these circumstances. The lower court also quite properly distinguished the cases of *Peabody* v. *United States*, 231 U. S. 530, and *Portsmouth Company* v. *United States*, 250 U. S. 1, pointing out that the intention of the United States to use the land of a private owner as a suitable field over which to fire heavy guns, which had been installed for that purpose, may constitute a taking, but that, in such a situation, the installation of guns, plus the existence of the intention to fire them at will, deprives the owner of the use of his land and constitutes a taking (R. 247). There neither physical occupancy of the lands nor any other character of possession was contemplated. In the cases at bar, the Government contemplated physical occupancy by flooding at a later date.

By May 30, 1937, the construction of the dam had proceeded further but it was still incomplete, both as to construction and operation, only a very small part of the lands to be permanently submerged was flooded, and no part of the lands to be flooded intermittently was subject to such flooding. We know of no case, and the Government has cited none, holding that where lands are to be flooded in connection with a navigation project there is a taking prior to the completion of the dam and prior to the actual flooding of the lands. So we agree with the Government that there is no more justification for the contention that these causes of action accrued on May 30, 1937, than there is for the contention that they accrued on October 21, 1936 (Br. 37). True, one witness for the Government testified that on May 30, 1937, the dam was "capable of being operated as it is today" (R. 172). At best this language is ambiguous and the fact remains that the dam was not so operated. The lower courts found that the dam was completed, inspected and accepted as complete on August 20, 1937

(R. 38). The Government carefully omits any reference to the date of completion. Instead, it speaks of the date of acceptance and argues that it was a mere formality, bearing no relationship to the progress of construction work on the dam. If, contrary to our belief, the date of completion is a material fact, we submit that a determination of that date by the Government, as between itself and the contractor, is entitled to vastly more weight than the evidence of the one witness in this case. At that time the Government was concerned with the *completion* of the dam and not with the period of limitations under the Tucker Act.

The taking was not complete until September 22, 1938. On that date, all of the lands to be permanently submerged were for the first time flooded and the condition created which subjects the lands between elevation 566 and 574 to intermittent flooding. The lower court properly held that the causes of action accrued on that date. *Marion County, West Virginia* v. *United States*, 53 Ct. Cls. 120; *Columbia Haley Dooner, et al.*, v. *United States*, 95 Ct. Cls. 392; *United States* v. *Clarke*, 69 F. (2d) 748; and *Joplin* v. *United States*, 89 Ct. Cls. 345. In the *Marion County* case, a navigation dam was constructed in the Monongahela River and as a result certain public roads in Marion County were completely submerged and other roads subject to intermittent flooding as soon as the pool was filled. In this case, as in the cases at bar, the new pool was attained by a series of rises covering a period of several months. The destruction of the roads by intermittent flooding was a gradual process, and the plaintiff contended that the taking did not occur nor the statute of limitations begin to run until the roads had been destroyed and abandoned. The court discussed three possible views as to when the statute of limitations might begin to run in cases of this kind:

First, when the dam was completed and put in operation; second, when the first damage was suffered; third, at some subsequent time when the taking is deemed to be complete. The second view was found applicable to tort actions for a continuing trespass but not applicable to suits under the Tucker Act, the latter being on contract implied from the complete taking of property. The third view, typified by *King* v. *United States*, 59 Fed. 9, wherein the damages to a plantation continued over a period of years and the period of limitations was said to start with its abandonment, was likewise disapproved. The court mentioned the rule of certainty which is said to permeate the law and explained that the idea of a taking seems necessarily to embody in its nature a specific act which must have occurred at a time definitely to be ascertained. Returning to the first view, the court observed that the same governmental act had been declared on as to all the roads, both those flooded at pool level and those subject to intermittent flooding, and concluded (150):

> "We are of the opinion that the cause of action, if there was one, as to the roads now in question accrued when Dam 14 was completed and put in operation by the filling of the pool."

Chief Justice Campbell, in the last paragraph of his concurring opinion, said (155):

> "When the water had reached pool level the taking, so far as there was any, was complete."

In the *Dooner* case, lands were submerged in connection with the construction of a navigation dam. The State of Illinois commenced the project. Before it reached the point of flooding plaintiff's property, the United States

undertook its completion. In order to fix liability, as well as compute interest on the claim, it became necessary to determine the date on which the cause of action accrued. The Court held:

> "On January 16, 1933, the defendant raised the level of the water and permanently submerged plaintiffs' lands * * * Since plaintiffs' property was taken on January 16, 1933, it is necessary, in order to give them just compensation for the taking, that they be awarded interest from that date * * *." (399-400)

The Government seeks to avoid the force of this decision by referring to the special findings of fact wherein it appears that the lock and dam were closed on January 16, 1933, and the actual flooding was completed seventeen days later. It is a well recognized rule that in determining the doctrine or *ratio decidendi* of a case, the facts stated in the opinion are conclusive and cannot be contradicted from the record.[1] If we are not bound by the facts as stated by the Judge it would be wholly illogical to be bound by his conclusions on those facts.

The Government cites *Kincaid* v. *United States*, 37 F. (2d) 602, in support of its contention that the cause of action accrued on October 21, 1936, when the dam, though far from complete, was first used to flood lands downstream from respondents' properties. In that case the structure installed by the Government was designed to direct the waters on plaintiffs' lands only in time of floods. The court pointed out that the physical occupancy contemplated would not take place until the land is overflowed in time of floods. No other character of possession was contemplated. The court held that the property

[1] Essays in Jurisprudence and The Common Law, 1-26. By Arthur L. Goodhart, Cambridge University Press (1931).

owner need not wait until after the floods came but that his cause of acion accrued when the construction work was complete. In the cases at bar, the structure results in submerging lands under normal conditions and without waiting for floods. The lands to be flooded intermittently follow later as a result of floods and the manipulation of the moveable parts of the dam after the new pool has been created. We submit that the *Kincaid* decision supports the lower court's holding that these causes of action accrued on September 22, 1938.

The Government also cites the case of *Jacobs* v. *United States*, 290 U. S. 13; wherein recovery was allowed for intermittent flooding, and in which the District Court allowed interest from the date of the completion of the dam. On appeal to this Court the only question presented and considered was whether the Government was liable for *any* interest. The date from which interest was to be computed was not in issue. In any event, it will be recalled that the Winfield Dam was completed on August 20, 1937. If the causes of action be treated as accruing on that date, still these suits were timely brought, and Dickinson had acquired his title prior to that date. It might be noted also that the Government later in its brief (Br. 41) contends that the date of completion is immaterial and not to be considered as fixing the time when the cause of action accrues.

In further support of its contention that the causes of action accrued when the dam was first used, although admittedly far from complete and its limited use had no effect on respondents' properties, the Government enumerates some ten alternatives, including the holding of the lower court, and suggests that all of these are "demonstratively unsound" (Br. 39). We believe the Government first demonstrates a misapprehension on the

part of its counsel as to what the lower court held. It is absurd to contend that the holding of the lower court "would require the owner of lands lying at a low elevation, which had been completely flooded, to wait without remedy until the United States had taken other property in which he had no interest." Neither does it require the pool to reach its permanent level before any landowner could sue, although his land may have been completely submerged at a lower level (Br. 40). However, we agree with many of the reasons assigned by the Government for considering the other nine alternatives unsound. Except for alternative No. 6 (Br. 42), we submit that the Government's discussion demonstrates rather well the essential soundness of the lower court's holding that the taking occurred when the lands are first completely submerged. The criticism offered in alternative No. 6 to the rule which would deny relief until all of a single tract of a particular plaintiff has been submerged, is without merit. This rule does permit the owner of a small tract at a low elevation to sue earlier than the owner of a larger tract which is situated in part at a higher elevation. But that situation arises from the nature of the rights and duties under the Fifth Amendment. Were they tort actions for a continuing trespass each might sue upon the happening of the first injury. These are contract actions on an implied promise. There is but one cause of action for each tract of land regardless of its size or elevation and the promise is not implied until the taking is complete.

The rule contended for by the Government is not supported by precedent, in principle, on logic, or by natural justice. On October 21, 1936, no part of respondents' properties had been encroached upon. Winfield Dam was under construction at a point some 22 miles downstream. The engineers of the Government,

of course, knew that the plans called for flooding all lands below elevation 566, Sandy Hook datum. Word or rumors to that effect had no doubt spread to the community in which the respondents lived. There may have been rumors also to the effect that certain lands above elevation 566 would be flooded occasionally.[2] However, a description of lands by reference to elevations above mean sea level according to Sandy Hook datum, carry no real meaning to the average citizen. In any event, it would have been impossible at that time for either respondent to determine the nature and extent of the damages to the residue of his tract. The lands were not actually flooded until almost two years later, and, as the lower court pointed out, the whole matter was subject to Government change and control. Under the rule of certainty mentioned by Judge Downey in the *Marion County* case, it would be unreasonable to say that the taking occurred as early as October 21, 1936. All of these uncertainties were to disappear later when the lands were actually submerged. Not until then could the landowners make a fair appraisal of the property rights involved.

The Government could have acquired title by condemnation as early as it chose. In that event, the law would require that the property owner be furnished an understandable description of the lands involved, full particulars as to the dam, its method of operation and the use of the land contemplated—information which would afford, even before construction of the dam, a basis for a determination of the property rights involved. But

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[2]It was later that the United States District Engineer and other agents of the Government represented to respondents that the area between elevations 566 and 574 would be flooded occasionally in connection with the operation of the dam.

where the Government, as in the cases at bar, refuses to condemn any flowage easements within the entire pool, except on non-navigable tributaries, and the property owner is left the choice of selling his land at such nominal price as the Government agent may offer or suing under the Tucker Act (If the claim exceeds Ten Thousand Dollars he must go to Washington to conduct his suit), it is hardly fair to say that his cause of action accrues before he can see any physical effects of the taking. The disadvantage of it is illustrated by the not uncommon case of where the owner sells under the impression that the damage will be slight and later finds to his sorrow that the damages are greatly in excess of the sum paid him by the Government. Where the Government refused to condemn and the owner must depend on his own resources in asserting his claim, what better event could be selected as fixing the date on which his right of action accrues than when the land is first completely submerged? Certainly that rule is fair to both sides and involves none of the uncertainties that attend the events contended for by the Government such as when the dam was "first used to impound water" or when the dam was "capable of operation" in a certain manner. Even engineers might well disagree as to when those events occur.

The only difference between the factual situations on October 21, 1936, and on May 30, 1937, is that by the latter date the construction of the dam had proceeded further and the first small encroachment on respondents' lands had taken place. Judge Downey in the *Marion County* case rejects the "first injury" rule as applicable only to tort action for a continuing trespass. The Government also disapproves the "first injury" rule as "demonstrably unsound" (Br. 43).

II. The Lower Court Correctly Held That Each Respondent Is Entitled to Recover the Damages to the Residue of His Tract of Land, Above That Permanently or Intermittently Flooded, Caused by and Which Are the Proximate Result of the Taking of the Part Appropriated; That Such Damages Include Erosion Due to Saturation and Softening of the Soil and Wave Action Thereon; and That Where Such Damages Can Be Prevented by Timely Protective Measures at a Cost of Less Than the Amount of the Damages Which Will Ensue If Permitted to Go Unchecked, the Measure of Compensation Is the Cost of Such Protective Work.

In the case of Dickinson, the damage to the residue of the tract, above that permanently submerged and that subject to intermittent flooding, was quite considerable. Between 5,000 and 7,000 cubic yards of the river bank broke off and slipped into the river. Approximately 30 shade trees, ranging from 6 inches to 18 inches in diameter, were destroyed, and a large crack developed in the earth above the top of the river bank extending through the foundation of Dickinson's residence doing substantial damage thereto. Dickinson expended approximately $16,000.00 to prevent further such erosion and damage (R. 39). Withrow has not installed any protective measures and the damage to the residue of his tract is even more extensive. The area to be intermittently flooded has long since slipped into the river and disappeared. Approximately 20 shade trees, ranging from 6 inches to 24 inches in diameter, have been destroyed, and the unpaved portion of River Drive in front of his residence has subsided as much as 8 inches (R. 41). The lower court found that in each case this damage to the residue was the direct and proximate result of the flooding and taking of the part appropriated (R. 39, 41); that protective measures which would have been adequate to prevent the erosion and damage if installed prior to the raising of the pool stage would have cost, in the case

of Dickinson $4,245.63 (R. 40), and in the case of Withrow $1,859.40 (R. 41); and that such protective measures would have been economically justified in the sense that in each case the damage if unchecked would exceed the cost of such protection (R. 40, 41). The lower court held that the respondents are entitled to recover such costs as a part of the just compensation guaranteed by the Fifth Amendment, relying upon the following authorities: *United States* v *Grizzard*, 219 U. S. 180; *United States* v. *Welch*, 217 U. S. 333; *Campbell* v. *United States*, 266 U. S. 368; *United States* v. *General Motors Corporation*, 323 U. S. 373; Lewis on Eminent Domain, 3d Ed., Sections 686 and 710; *United States* v. *Chicago, B. & Q. R. Co.*, 8th Cir. 82 F. (2d) 131, certiorari denied 298 U. S. 689; and *United States* v. *Chicago, B. & Q. R. Co.*, 7th Cir. 90 F. (2d) 161, certiorari denied 302 U. S. 713 (R. 249, 250). Other authorities may be cited if indeed additional authority would seem necessary. *United States* v. *Cress*, 243 U. S. 316; *United States* v. *Wabasha-Nelson Bridge Company*, 7th Cir. 83 F. (2d) 852; *Harman* v. *Bluefield*, 70 W. Va. 129, 73 S. E. 296; *Monongahela Valley Company* v. *Windom*, 78 W. Va. 390, 88 S. E. 1092; and *Wood* v. *Wyoming County Court*, 100 W. Va. 29, 129 S. E. 747.

In the *Grizzard* case the Government flooded a part of the defendant's farm in connection with a project to improve navigation. A highway crossing the flooded land afforded the defendant an easement of access to the turnpike, and by its destruction the value of the residue of the farm was impaired. This Court held that the Government was liable for such damages to the residue, saying:

> "The constitutional limitation upon the power of eminent domain possessed by the United States

is that 'private property shall not be taken for public use without just compensation'. The 'just compensation' thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel, or single tract of land, shall be measured by the loss resulting to him from the appropriation. If, as the court below found, the flooding and taking of a part of the plaintiff's farm has depreciated the usefulness and value of the remainder, the owner is not justly compensated by paying for only that actually appropriated, and leaving him uncompensated for the depreciation over benefits to that which remains. In recognition of this principle of justice it is required that regard be had to the effect of the appropriation of a part of a single parcel upon the remaining interest of the owner, by taking into account both the benefits which accrue and the depreciation which results to the remainder in its use and value. Thus, in *Bauman* v. *Ross*, 167 U. S. 548, 574, 42 L. ed. 270, 283, 17 Sup. Ct. Rep. 966, 976, it is said:

" 'Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened.' ".

The first of the *Chicago B. & Q. R. Co.* cases involved a state of facts very similar to the cases at bar. The railroad right of way and embankment of the defendant ran along the Mississippi River west of and upstream from

the town of Hastings in Minnesota. The Government constructed a dam near Hastings flooding the riverward side of the railroad right of way and embankment for approximately 4 miles, although the area actually flooded did not exceed 24 acres. It became necessary for the railroad company to raise its tracks at several points and reconstruct numerous culverts and bridges as well as riprap the river side of its embankment to prevent erosion due to saturation and softening of the soil and wave action thereon. The value of the 24 acres flooded was rather nominal but the cost of the protective work ran into the neighborhood of $300,000.00. The court sustained a recovery of the damages to the residue, including the protective work, holding that when part of a single tract of land is taken, compensation is allowable for proximate damages to the remainder of the tract; that ordinarily "consequential damages" are those which do not arise as the immediate, natural and probable result of the act done, but arise from the interposition of additional cause, without which the act done would have produced no harmful result, while "proximate damages" are those which accrue directly and in natural sequence, and as the specific result of the act done, without intervention of independent cause. The court further pointed out that when the given act is such as to put in force normal law of nature, which in conjunction with the original act done, produces a harmful result, such result is the "proximate cause" of the act done. In the Government's petition for a writ of certiorari in this case, two questions were presented: (1) whether compensation should be awarded for anticipated damage from saturation, erosion, wave action and silting, and (2) whether compensation should be awarded for the cost of protective measures undertaken by the railroad company (petition p. 5 filed May 11, 1936). Thus it appears that

the specific questions involved in the cases at bar were submitted in clean cut fashion to this Court, and this Court refused to disturb the judgment of the lower court.

The second *Chicago B. & Q. R. Co.* case arose in the Seventh Circuit upon a substantially similar state of facts and the railroad company was allowed the sum of $400.00 for 1.6 acre of land completely submerged and the additional sum of $347,411.65 as just compensation for the damage to the remainder of the railroad's property which was caused by the construction and operation of the dam. Petition for writ of certiorari was denied in this case.

In the more recent *General Motors Corporation* case, decided on January 8, 1945, this Court extended the principle of damages to the residue to the situation where the Federal Government condemns less than all of a leasehold estate, leaving to the condemnee a remainder of the term, holding that certain injuries or damages to the residue are recoverable as a part of the just compensation guaranteed by the Fifth Amendment, although such damages might be regarded as consequential had the Government taken all of the estate and left no residue. Mr. Justice Roberts, speaking for the Court, said:

> "Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the esablished law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress.
>
> "It is altogether another matter when the Gov-

> ernment does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the 'market rental value' for the use of the chips so cut off. This is neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates." (382.)

It might be pointed out also that in 1918 the Congress of the United States expressly recognized the liability of the Government for damages to the residue of the tract when only a part is taken for public use.[3]

As observed by the court below, the real conflict between the parties arises out of the failure of the Government to recognize the distinction between the case where there is an acknowledged taking (physical invasion) of a part of the riparian's fast lands, with damages to the residue of the tract, and the case where there is no actual invasion of fast lands but injuries that follow as a natural consequence of lawful measures to improve navigation (R. 248).

The Government contends that where it is practicable to protect private property from governmental action, the United States is not liable for the cost of protective meas-

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[3] "In all cases where private property shall be taken by the United States for the public use in connection with any improvement of river, harbors, canals or water ways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, *where a part only of any such parcel, lot or tract of land shall be taken*, the jury or other tribunal awarding the just compensation or assessing the damages to the owner, whether for the value of the part taken or *for the injury to the part not taken*, shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement, and shall render their award or verdict accordingly." (Italics supplied.) (July 18, 1918, c. 155, sec. 6, 40 Stat. 911, 33 U. S. C. A. 595.)

ures or, if they are not undertaken, for the damages which in consequence result. The same line of authorities are cited as were relied upon before the court below (Br. 47). *United States* v. *Lynah*, 188 U. S. 445, 474; *Bedford* v. *United States*, 192 U. S. 217, 225; *Manigault* v. *Springs*, 199 U. S. 473, 484-485; *Southern Pacific Co.* v. *United States*, 266 U. S. 586, affirming 58 Ct. Cls. 428; *Mills* v. *United States*, 46 Fed. 738 (S. D. Ga.); *Salliotte* v. *King Bridge Co.*, 122 Fed. 378 (C. C. A. 6); *Kelley's Creek and N. W. R. Co.* v. *United States*, 100 Ct. Cls. 396, 412.

In none of these cases was there a permanent submersion of fast lands and an acknowledged taking of a part of a single tract, such as has occurred in the cases at bar. The Government is mistaken in the assertion that the *Mills* case involved a recovery of the cost of levees which Mills would have had to build to protect lands flooded above high water mark as a result of a dam put in the river by the Government. In this case there was no flooding or taking of lands above ordinary high water. The court said (p. 747):

> "It must be observed, with relation to the claim of damage caused by the overflow of the plaintiffs' lands during the freshets, that they do not stand in the attitude of land-owners above mean or high water level. Their lands are reclamations as appears from the declaration, which would be covered, not only by ordinary high water, but by the ordinary flow of tide."

In the *Lynah* case this Court approved the *Mills* decision (p. 474) saying:

> "Obviously, there was no taking of the plaintiffs' lands, but simply an injury which could be reme-

died at an expense as alleged of $10,000.00, and the action was one to recover the amount of this consequential injury. The court rightfully held that it could not be sustained."

The *Lynah* case was distinguished from the *Mills* case and a recovery sustained on the grounds that the lands in controversy were irredeemable and their value wholly destroyed. It is important to note; however, that both the *Mills* case and the *Lynah* case were concerned with damages to lands lying below ordinary high water mark, and the *Lynah* decision, insofar as it upheld a recovery for lands lying below ordinary high water mark has been overruled. *United States* v. *Chicago, M. St. P & P. R. Co.*, 312 U. S. 592, 598.

On navigable waters the public has without question a dominant easement over the bed of the river which extends to ordinary high water mark, and, of course, the Government is not answerable for the flooding or damage to the area lying between low water and ordinary high water mark. Neither would the Government be liable for protective measures to prevent damage or injury to that area. If the work of the Government to improve navigation involves no direct invasion of fast lands but some incidental injury thereto as a result of a lawful structure in the bed of the stream, still the Government is not liable under the Fifth Amendment, as such injuries are said to be consequential. But where the Government, in the exercise of its power of eminent domain and to improve navigation, constructs a dam which permanently submerges fast lands, we submit that the requirements of the Fifth Amendment cannot be satisfied by a determination that the owner could have prevented the invasion of his property by protective work at his own expense. And where in addition to the taking of a

part of a single tract, there is damage to the residue of the tract, caused by the taking of the part appropriated, again the requirements of the Fifth Amendment are not met by a determination that it would have been possible for the owner by the outlay of money to prevent such damage to the residue. One might argue with equal plausibility that the taking of a horse for the public use is not compensable under the Fifth Amendment if the owner has the resources and can go in the open market and replace the horse. Certainly the guaranties of the Fifth Amendment are not to be dissipated by any such legal sophistry. Years ago this Court pointed out that it is by "silent approaches and slight deviations from legal modes of procedure [that] illegitimate and unconstitutional practices get their first footing", *Boyd* v. *United States*, 116 U. S. 616; and that "in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government". *Monongahela Nav. Company* v. *United States*, 148 U. S. 310.

The Government also cites the case of *Kelley's Creek & N. W. R. Co.* v. *United States*, 100 Ct. Cls. 396 (1943), as authority for the contention that there can be no recovery for land the taking of which could have been prevented by protective measures. In that case Judge Whitaker, speaking for the court on motion for a new trial, expressed dissatisfaction with the "strange result" reached, but held (412):

> "Plaintiffs could have protected its lands which were actually overflowed, but they chose not to do so. For these they can recover; but they cannot recover for lands which would have been overflowed, but which were not in fact, because plaintiffs spent money to keep them from being."

Dickinson's lands were actually flooded and remained completely submerged for some two years, and Withrow's lands are still completely submerged, so both would be entitled to full recovery even under the *Kelley's Creek* decision. The basic soundness of this decision in other respects may well be questioned. Judge Whitaker failed to recognize the distinction between the situation where there is no taking or physical invasion but mere consequential damages, and the case where there is an actual taking of a part of the tract and damages to the residue. That distinction has been clearly pointed out in the numerous cases cited above.

The Government now advances the argument that in these cases the damage to the residue of the tract was caused not by the taking of the part but by the use to which the part is devoted; and that in the case of a partial taking just compensation does not include damages to the residue resulting from the use to which the part taken is devoted, and hence the Government is not required to pay for the cost of preventing such damages (Br. 48-55). The Government is in error on its first premise. The damage to the residue of respondents' lands was in each case the direct and proximate result of the flooding of the part (R. 39). The flooding constituted the taking. The lower courts so held and that holding is fully supported by the authorities cited in Point I pp. 6-15, *supra*. The second premise is equally false. In the case of a partial taking of a single tract just compensation includes any damage to the residue resulting from the use to which the part taken is devoted. The rule laid down by Lewis, Eminent Domain, (3d. Ed.) Secs. 686 and 710, is as follows:

> "When part is taken, just compensation includes damages to the remainder. Upon this point there

> is entire unanimity of opinion (citing cases). 'The constitutional provision cannot be carried out, in its letter and spirit, by anything short of a just compensation for all the direct damages to the owner of the lot, confined to that lot, occasioned by the taking of his land. * * *'
>
> "When part of a tract is taken the damages are not limited to such as result from the mere severance of title caused by the taking, but include damages caused by the use of the property for the purpose for which the condemnation is made. (citing cases.) Such use embraces the construction of the work or improvement and the maintenance, use and operation of the same."

This Court has recognized the above rule on more than one occasion. *Campbell* v. *United States*, 266 U. S. 368; *Sharp* v. *United States*, 191 U. S. 341; and *United States* v. *Grizzard*, 219 U. S. 180. In the *Campbell* case, plaintiff's claim consisted of (a) $750.00 as the value of the part taken; (b) $2,250.00 as damages to the residue by reason of the taking and use of the part appropriated; and (c) $5,000.00 as damages to the residue by reason of uses made of land acquired by the Government from others for the same project. The District Court allowed the first two items and disallowed the third item. On appeal to this Court the judgment was affirmed. In the *Sharp* case, plaintiff owned three separate and independent, though adjoining, farms, only one of which was taken by the Government. The plaintiff sought to recover damages to the other farms arising from the use of the one farm taken. The claim was disallowed by the District Court as well as by the Court of Appeals and the judgment was affirmed by this Court. In discussing the principles involved Mr. Justice Peckham, speaking for this Court, said (354):

> "If the remaining land had been part of the same tract which the Government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the Government, would be a proper subject of award in these condemnation proceedings. But the Government takes the whole of one tract."

The *Grizzard* case likewise involved the taking of a part of a single tract with damages to the residue and Mr. Justice Lurton, speaking for this Court, said (184):

> "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted."

The Government suggests that the language, "embracing, of course, injury due to the use to which the part appropriated is to be devoted", was not necessary for the decision and is to be treated as *obiter*. It will be noted that the facts in the *Grizzard* case and the facts in the cases at bar are essentially the same. In each case the Government flooded a part of a single tract of land which resulted in damages to the residue. In our view the flooding constituted the taking in each case. However, the Government argues that in the cases at bar the flooding was the use to which the part taken was devoted, and not the act of taking. Even so, the same would be true in the *Grizzard* case, in which event, the language of Mr. Justice Lurton could not be regarded as *obiter*.

In the case of a partial taking of a single tract of land with damages to the residue, the Congress has provided that the award to the owner must take into consideration and allow for the special and direct benefits to the residue arising from the improvement, including, of course, the use of the part taken. *Supra*, p. 21, Note 3. Certainly the Fifth Amendment does not permit the Government to claim credit for benefits to the residue arising from the use of the part taken, and disclaim liability for the damages to the residue arising from the use of the part taken.

Although cited and relied on by the Government, *High Bridge Lumber Company* v. *United States*, 69 F. 320, does not support the contention that in the case of a partial taking the Government is not liable for the damage to the residue caused by the use made of the part taken (Br. 53). The anticipated flooding of the residue to arise from the use of the part taken had not yet occurred, and the court merely held that the claim was premature. Obviously, where the Government takes by a condemnation suit prior to the use, the act of taking and the act of use are separate and distinct. Where the Government neither buys nor condemns but, as in the cases at bar, takes by flooding, the act of taking and the act of use are one and the same, at least indistinguishable. In the *High Bridge Lumber Company* case, the Government acquired title by condemnation prior to the construction of the dam and prior to any use of the land. The primary question was whether the award should include anticipated damages to adjacent lands of the defendant not proceeded against which were expected to be flooded and damaged as a result of the construction and operation of the dam. The court pointed out that the damage to the adjacent lands was not caused by the *taking* of the lands proceeded against; that there

had been no present appropriation or physical invasion of the remainder of defendant's lands; and that (p. 326):

> "To now seek compensation for the remainder of the land on the theory that the dam will be so constructed and maintained as to permanently flood the remainder, and amount to a 'taking' of such land, is premature. The remainder has not yet been 'taken', and until it has been appropriated in fact, by permanent flooding, no right to be compensated will accrue."

For such bearing as it may have on Point I above, pp. 6-15, it is of interest to note that, with respect to the lands not proceeded against, the court said that the cause of action does not accrue "until it has been appropriated in fact, by permanent flooding". Some aspects of this decision, particularly with respect to what are said to be consequential damages and the extent of temporary or intermittent flooding required before there is a taking in the constitutional sense, are difficult to reconcile with later decisions of this Court, such as in the *Grizzard* case, the *Cress* case and the *Jacobs* case. However, it should be borne in mind that Mr. Justice Lurton wrote the opinion in the *Grizzard* case in 1911, sixteen years after he (as Circuit Judge) had written the opinion in the *High Bridge Lumber Company* case. It is the *Grizzard* case on which the Court of Appeals relied.

III. The Lower Court Correctly Awarded Compensation to Dickinson for His Lands Permanently Submerged But Later Reclaimed at His Own Expense.

0.22 acre of Dickinson's fast lands were completely and permanently submerged on September 22, 1938. During the year 1940, Dickinson secured a permit from

the Secretary of War and proceeded to install protective measures along his river bank to prevent further erosion and damage. The protective measures consisted of approximately 8,000 cubic yards of rock fill and 8,000 cubic yards of earth fill at a cost of $16,000.00. The earth and rock fill exceeded in quantity the amount of the river bank that had eroded and washed into the river so that all of the 0.22 acre originally submerged has in effect been reclaimed except 0.05 acre.

The Government contends that if Dickinson had by protective measures prevented the Government from submerging his land, he could not have recovered its value or the cost of preventing the taking; and that it follows that if he could have protected his land from flooding and failed to do so, he is not entitled to recover either the value of the land or the cost of protection, citing *Mills* v. *United States*, 46 F. 738 (Br. 55, 56). We submit that this contention is without merit and that it receives no support from the *Mills* case. As pointed out above (Point II, pp. 22-23, *supra*) the *Mills* case involved no flooding of or encroachment on fast lands.

The question presented is, where fast lands have been completely submerged and taken by the United States for public use, and a right of action has accrued to the owner, under the Fifth Amendment, for the full value of the lands taken, does the landowner lose any part of his cause of action or right to compensation if, before suit or payment, he, at his own expense and with the consent of the Government, reclaims a part of the land by filling? The lower court correctly held that on September 22, 1938, the land was taken under an implied contract on the part of the United States to pay for it and that "it is clear that the Government was not relieved from this obligation by the mere fact that the

landowner, with its approval, subsequently recovered a part of the acreage at his own expense." (R. 251).

Moreover, we believe the record in this case precludes the Government's contention. The Government's formal answer to the complaint filed in the District Court, Paragrah V thereof (R. 4) specifically admits that Dickinson's land was flooded up to elevation 566 feet, and that *"said flooding has covered 0.22 acre of the land* described in paragraph 2 of the complaint." Further, by the pre-trial order made and entered in this cause on July 1, 1943 (R. 7) counsel for the Government stipulate and agree that the present normal pool stage of the river at Dickinson's property is 11.35 feet above the normal pool stage of Old Lock and Dam No. 7, and that *"0.22 acre of lands described in the complaint is permanently submerged thereby;"*. That a litigant is bound by formal admissions in his answer needs no citation of authority. Were there no such admissions in the answer, the agreement of facts as set forth in the pre-trial order would be sufficient to preclude the Government. *Daitz Flying Corp.* v. *United States*, 4 F. R. D. 372.

IV. There Is Ample Evidence to Support the Lower Courts' Awards for a Partial Taking by Intermittent Flooding of Respondents' Lands Lying between Elevations 566 and 574.

The district court found that .10 acre of Dickinson's land and .04 of Withrow's land, lying between elevations 566 and 574 feet, will be flooded intermittently, and that the value of such flowage easement was $75.00 in the case of Dickinson, and $35.00 in the case of Withrow (R. 39, 40, 41). The Government contends that there was no intent to flood intermittently up to elevation 574; that there was no evidence to indicate the extent and value of easements to flood intermittently, and that as a conse-

quence there is no evidence to support the awards for such easements.

We agree that an intent to flood or an intent to take is a necessary part of the transaction if contract liability is to result from the taking. But the intent, like the promise to pay, may be implied from a course of conduct on the theory that the Government intends the natural consequences of its own acts. Fortunately, the evidence in these cases discloses much more than an intent by implication. Agents of the Government on several occasions sought to purchase from respondents flowage easements covering the area lying between elevations 566 and 574 feet, representing that it would be flooded occasionally in connection with the operation of the dam (R. 66-67). The map prepared by the Government's engineers and furnished to Dickinson during such negotiations included the area lying between elevations 566 and 574 feet (Dickinson Exhibit No. 2, R. 51). The letters to Dickinson from Major Frech, U. S. Engineer at the Huntington office, stated that the Government desired said easement area, and explained that it would be needed in connection with the operation of the Winfield Dam (Dickinson Exhibits Nos. 14 and 15, R. 58). During the trial the Government stipulated on the record that in acquiring by condemnation other flowage easements within the Winfield Pool, it had in every case acquired easements above elevations 566 feet (normal pool) ranging from 3 feet at the dam to 8 feet, or elevation 574 feet at respondents' properties (R. 168). One of Government's counsel was called to the witness stand and he stated on the record that in each and every one of these condemnation suits, the Government alleged in its verified petition that the easement area above normal pool would be flooded occasionally (R. 168). In response to a question by the court as to why the Government

needed a flowage easement up to elevation 574, when normal pool was at elevation 566 feet, the Government's own witness stated:

> "Well, in this 8 foot area of water, the stage of the river *will rise and fall due to the manipulation of the dam.* Above 574 feet we have no control over the river and the water will rise to the same elevation as it did before the construction of the dam." (R. 194).

True, witnesses Carpenter and Ross, both employees of the Government, suggest in language frequently vague or contradictory that if the method described for the operation of the dam should at all times be strictly adhered to, and in the absence of any breakdown or failure in the communications system by which weather reports are sent in from various parts of the country, and provided further that there is at no time in the future any failure of electric power, mechanical breakage or human error (conditions never experienced or counted upon in human affairs) the Government would have no occasion to make use of the flowage easement area between elevations 566 and 574. This evidence, of course, is in conflict with other evidence in the case, and is contrary to the overall plan and prosecution of the project, as borne out by the acts and representations of the Government detailed above. In this connection it might be pertinent to note also that the Secretary of War is authorized to acquire, by condemnation or purchase, only such lands and flowage easements as may be "needed to enable him to maintain, operate and prosecute works for the improvement of rivers and harbors for which provision has been made by law." 25 Stat. 94, 33 U. S. C. A. 591. Admittedly the Government has expended federal funds for the acquisition of many other easements to flood in-

termittently the area between elevations 566 and 574 feet. Unless those flowage easements were neded in connection with the Winfield Dam, the Secretary of War had no authority to acquire them. It would be a strange situation if the Secretary of War could justify his acts by claim of necessity in the case of voluntary acquisitions, and deny such necessity or use where suit is brought against the Government under the Tucker Act.

A point is attempted to be made of the fact that respondents were not able to show the frequency, duration or velocity of the intermittent flooding between elevations 566 and 574. At the trial the court asked if respondents' evidence would show "how often the intermittent flooding will occur". The respondents could not show that, of course. It involves weather conditions, future rainfall and floods, which no man can foresee with certainty, plus the intended manipulation of the moveable parts of the dam which is peculiarly within the knowledge and control of the Government. The lower court correctly held that it is sufficient to show the acquisition generally of similar easements in the Winfield Pool, the construction of a dam with equipment capable of flooding these lands up to elevation 574, plus an intent, implied from all the facts, to make use of the easements. It appears that the Government now admits that "construction of a dam capable of flooding lands intermittently and intended to be so used would constitute a taking of easements for that purpose". (Br. p. 36, note 11).

The evidence of past floods referred to by the Government (R. 191) merely shows the frequency of open river rises *above* elevation 574 during the period 1926 to 1940. It merely reflects the rainfall and natural flow of the stream during that period. The Government's own witness stated that the dam plays no part in the level of the

pool after it rises above elevation 574 (R. 194). This evidence, therefore, throws no light on the frequency of flooding between elevations 566 and 574 or the part that the dam plays in such intermittent flooding. Nor is there any aid to be found in *United States* v. *Sponenbarger*, 308 U. S. 256, and *Robert Y. Creech* v. *United States*, 102 Ct. Cls. 301. In neither of these cases was there any intermittent flooding of fast lands. In the *Sponenbarger* case the Court found (p. 266) that the Government had not subjected the land to any additional flooding above what would occur if the Government had not acted. In the *Creech* case, the court found that the levee had no effect on the height of the waters of the lake or on wind tides over and above the elevations which normally would have been occasioned under the same weather conditions without the levee.

The awards of $75.00 to Dickinson for an easement to flood intermittently 0.10 acre of his land, and $35.00 to Withrow for a similar easement on 0.04 acre of his land, are amply supported by the evidence. In addition to the evidence of three witnesses for respondents the Government offered the testimony of four witnesses (R. 228, 233, 237, 240). The Government's own evidence supports valuations above the allowances made by the district court. In the *Kelley's Creek & N. W. R. Company* case, *supra*, there was some question as to the sufficiency of the evidence to support an award for intermittent flooding. Neither the frequency nor the effect of the overflow was indicated. There was only one witness and in discussing his evidence the court said (p. 411):

> "He does not say how often it overflowed, or the effect of the overflows, but he does say that the acreage has been damaged that amount, $52.00 for that portion,' which is the total value of the

land as fixed by him. He was introduced by the Government and we, therefore, take it to be true that these periodic overflows in fact did destroy the value of this land. This being true, plaintiffs are entitled to recover the amount of $52.00 on this account. *Jacobs* v. *United States*, 290 U. S. 13, 16, and cases there cited."

Obviously all of the foregoing relates to the sufficiency of the evidence to support findings of fact by the lower court as to the partial taking by intermittent flooding and the value of such flowage easements. Respondents contend that it is sufficient. The Government merely renews before this Court the contention made by it before both lower courts, and the issues turn upon an appraisal of the evidence and the inferences to be drawn therefrom. Both lower courts found against the Government on these issues. We do not believe a re-examination of the evidence is called for. This Court has established the rule that it will accept findings of fact, concurred in by both lower courts, without re-examination of the evidence. *United States* v. *O'Donnell, et al*, 303 U. S. 501; *Marion H. Allen, Collector* v. *Trust Company of Georgia*, (decided January 28, 1946) 90 L. Ed. 305.

CONCLUSION

The essential facts, as found by the district court and concurred in by the Court of Appeals, are really not in dispute. True, the Government attempts to deny the partial taking by intermittent flooding of the area lying between elevations 566 and 574, but, as pointed out above, we do not believe that issue will be treated as open to re-examination in this Court. There can be no denial that the Government permanently submerged and took for public use 0.22 acre of fast lands belonging to Dickinson, and 0.11 acre of fast lands belonging to With-

row; that as a direct and proximate result of that taking, the residue of the tract in each case was greatly damaged; that the awards below take into account every reasonable and appropriate measure by the property owner to mitigate or minimize such damages to the residue; and that these suits were brought within six years from the date on which the lands were first completely submerged. Under the findings of the lower courts, there is as much causal relation between the act of the Government and the damage to the residue of the tract as there is between the same act of the Government and the flooding of the part taken. To say that the Fifth Amendment protects the owner against the smaller loss and not the greater, would do violence to the principles laid down by this Court in many cases, and, in our view, ignore the plain intent and purpose of the framers of the Constitution. We respectfully submit that the judgments of the court below should be affirmed in all respects.

J. H. McCLINTIC,
ERNEST K. JAMES,
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Counsel for respondents, William M. Dickinson and F. H. Withrow.

November, 1946.

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SUPREME COURT OF THE UNITED STATES

Nos. 77 AND 78.—OCTOBER TERM, 1946.

The United States of America, 77 v. William M. Dickinson. The United States of America, 78 v. F. H. Withrow.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[June 16, 1947.]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

These are two suits brought under the Tucker Act (Judicial Code § 24 (20), 28 U. S. C. § 41 (20)) to recover the value of property claimed to have been taken by the Government. The suits were consolidated for purposes of the trial and, though they present minor differentiating factors they may here, as below, be disposed of by a single opinion.

In order to improve the navigability of the Kanawha River, West Virginia, Congress authorized construction of the Winfield Dam, South Charleston. Act of August 30, 1935, 49 Stat. 1028, 1035, in connection with H. Doc. No. 31, 73d Cong., 1st Sess., pp. 2–4. The water above the dam was to be impounded to create a deeper channel and to raise the river pool level in that area. Notice of the proposed pool elevation was given to abutting landowners on July 1, 1936, and the dam was completed and officially accepted by the United States on August 20, 1937. The river was to be raised by successive stages from 554.65 feet to 566 feet above sea level. That level was not reached until September 22, 1938. As a result of the raising of the river the land belonging to the respondents was permanently flooded. In addition, erosion

attributable to the improvement damaged the land which formed the new bank of the pool.

Respondents recovered judgment for the value of an easement taken by the United States to flood permanently land belonging to them. Damages were also awarded for the erosion, based on the cost of protective measures which the landowners might have taken to prevent the loss. In addition, the court found that the United States had also acquired an easement for intermittent flooding of part of the land belonging to the defendants, and allowed judgment for the value of such an easement. The Circuit Court of Appeals affirmed the District Court's judgment. 152 F. 2d 865. We granted certiorari, 328 U. S. 828, because important questions were raised relevant to the determination of just compensation for the taking of private property by the Government.

First. The principal attack by the United States against the judgments is that both actions were outlawed. The applicable statute of limitations is six years. The complaints were filed on April 1, 1943. The Government argues that the statute began to run on October 21, 1936, when the dam began to impound water. In any event, it maintains that the six years began to run not later than on May 30, 1937, when the dam was fully capable of operation, the water was raised above its former level, and the property of the respondents was partially submerged for the first time. While on the latter view the time for taking had not run under the statute, Dickinson's claim would be barred because he acquired the land after that date.

The Government could, of course, have taken appropriate proceedings to condemn as early as it chose both land and flowage easements. By such proceedings it could have fixed the time when the property was "taken." The Government chose not to do so. It left the taking

to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy. These suits against the Government are authorized by the Tucker Act either as claims "founded upon the Constitution of the United States" or as arising upon implied contracts with the Government. (See the discussion of jurisdiction both in the opinion of the Court and in the concurring opinion in *United States* v. *Lynah*, 188 U. S. 445, and in *Tempel* v. *United States*, 248 U. S. 121.) But whether the theory of these suits be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation." The Constitution is "intended to preserve practical and substantial rights, not to maintain theories." *Davis* v. *Mills*, 194 U. S. 451, 457. One of the most theory-ridden of legal concepts is a "cause of action." This Court has recognized its "shifting meanings" and the danger of determining rights based upon definitions of "a cause of action" unrelated to the function which the concept serves in a particular situation. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67 *et seq.*

Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding "causes of action"—when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situ-

ation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him—for instance, the uncertainty of the damage and the risk of *res judicata* against recovering later for damage as yet uncertain. The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.

When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really "taken." Accordingly, we find that the taking which was the basis of these suits was not complete six years prior to April 1, 1943, nor at a time preceding Dickinson's ownership. In this conclusion we are fortified by the fact that the two lower courts reached the same conclusion on what is after all a practical matter and not a technical rule of law.

Nothing heretofore ruled by the Court runs counter to what we have said. The Government finds comfort

in *Portsmouth Co.* v. *United States*, 260 U. S. 327. But in that case the problem was whether by putting a gun battery into permanent position with a view to converting an area, for all practical purposes, into an artillery range, the Government inevitably took an easement in the land over which the guns were to be fired. The issue was not when a suit must be brought on a claim in respect to land taken by the United States, which is the issue before us, but whether there had been a taking at all.

Second. The Government challenges the compensation awarded for damage to the land due to erosion. It regards this damage as consequential, to be borne without any right to compensation. *Peabody* v. *United States*, 231 U. S. 530. Of course, payment need only be made for what is taken, but for all that the Government takes it must pay. When it takes property by flooding, it takes the land which it permanently floods as well as that which inevitably washes away as a result of that flooding. The mere fact that all the United States needs and physically appropriates is the land up to the new level of the river, does not determine what in nature it has taken. If the Government cannot take the acreage it wants without also washing away more, that more becomes part of the taking. This falls under a principle that in other aspects has frequently been recognized by this Court. It was thus put in *Bauman* v. *Ross*, 167 U. S. 548, 574: "when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account." So, also, *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Grizzard*, 219 U. S. 180. Compare *Sharp* v. *United States*, 191 U. S. 341, 355; *Campbell* v. *United*

States, 266 U. S. 368. Congress has recognized that damage to the owner is assessed not only for the value of the part taken but also "for any injury to the part not taken." See § 6 of the Act of July 18, 1918, 40 Stat. 911, 33 U. S. C. 595. If the resulting erosion which, as a practical matter, constituted part of the taking was in fact preventable by prudent measures, the cost of that prevention is a proper basis for determining the damage, as the courts below held.

Third. At considerable expense, and with the consent of the War Department, Dickinson reclaimed most of his land which the Government originally took by flooding. The Government claims that this disentitled him to be paid for the original taking. The courts below properly rejected this defense. When the property was flooded the United States acquired the land and it became part of the river. By his reclamation, Dickinson appropriated part of what belonged to the United States. Whether the War Department could legally authorize Dickinson's reclamation or whether it was in fact a trespass however innocent, is not before us. But no use to which Dickinson efforts changed the fact that the land was taken when it could subsequently put the property by his reclamation was taken and an obligation to pay for it then arose.

Fourth. Judgment was also allowed against the United States for taking an easement for intermittent flooding of land above the new permanent level, and a value for such easements was assessed. We find nothing in this record to justify our setting aside these concurrent findings by two courts. *United States* v. *O'Donnell*, 303 U. S. 501, 508; *Allen* v. *Trust Co.*, 326 U. S. 630, 636.

Judgments affirmed.